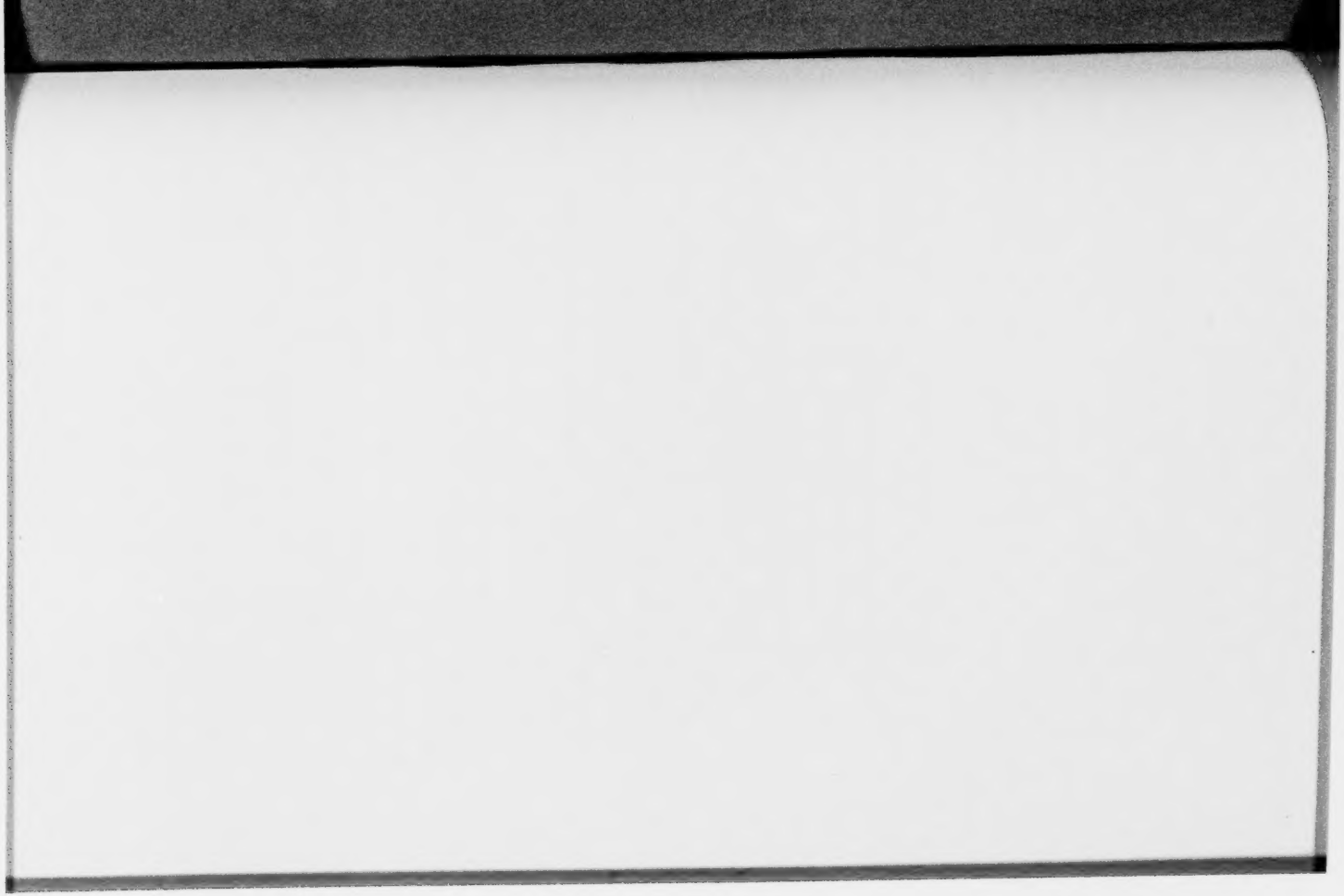


IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 951

SOOBUP-SOMERVILLE CATTLE COMPANY,
a corporation,

Petitioner,

vs.

J. LEE MERRION and RUSSELL WILKINS, a co-partnership, doing business as MERRION & WILKINS,

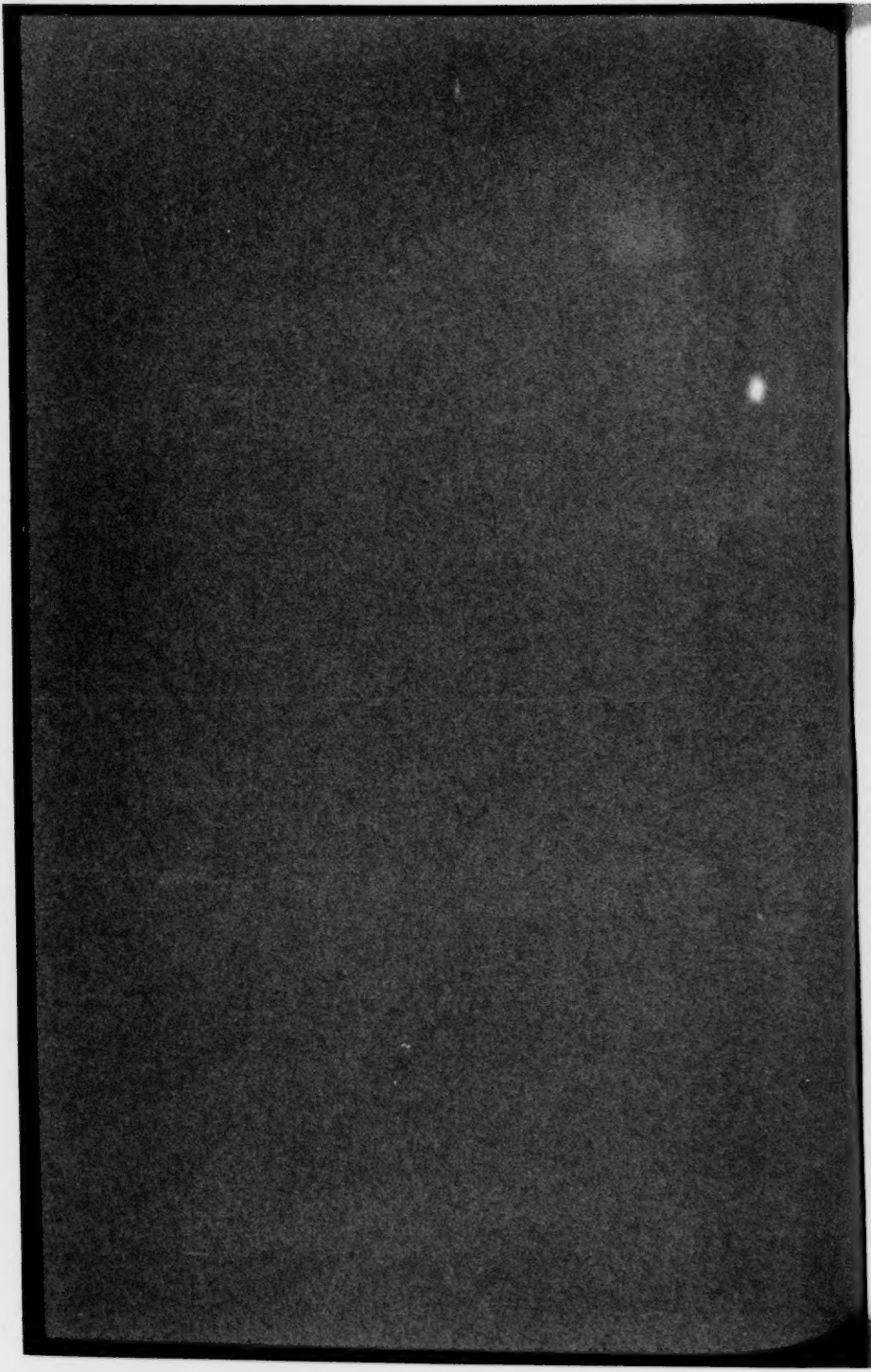
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITIONER'S PETITION FOR CERTIORARI

ROBERT L. JUDD,
PAUL H. RAY,
S. J. QUINNEY,
Counsel for Respondents

921 Kearns Building
Salt Lake City, Utah.

A. H. NEBEKER,
Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 951

SCORUP-SOMERVILLE CATTLE COMPANY,
a corporation,
PETITIONER,

vs.

J. LEE MERRION and RUSSELL WILKINS, a co-partnership, doing business as MERRION & WILKINS,
RESPONDENTS.

WILLIAM K. SOMERVILLE, ANNIE SOMERVILLE and ANNIE SOMMERVILLE, as Guardian of the Person and Estate of Richard D. Somerville, a Minor,
INTERVENORS.

BRIEF OF RESPONDENTS OPPOSING PETITIONER'S PETITION FOR CERTIORARI

SUMMARY STATEMENT

Scorup-Somerville Cattle Company is a corporation engaged in the cattle and ranching business in the State of Utah. J. A. Scorup is, and since the company was created, has been its President and Manager. He has always been the "boss of the outfit." He and his wife, daughters, nephews and nieces own 62½% of the company's outstanding stock.

Early in the year of 1941 Mr. Scorup told James G. Brown, a real estate and cattle broker, that the company wanted to dispose of its assets. About July 1, 1941, at the instance of Brown, he discussed the sale of the company's

property with Wolf & Kemper, cattle buyers of Denver, Colorado, but they reached no understanding.

Some time prior to July 5, 1941 ((the date of the Ellen Scorup proxy) (R. 62)) Mr. Scorup instructed Mr. McConkie, the Secretary of the company, to call a stockholders meeting to consider the sale of the company's assets. The Secretary prepared a written notice of meeting as follows:

> "Dear Stockholder:
>
> "There will be a meeting of the Stockholders of the Scorup-Somerville Cattle Company at the home of J. A. Scorup, Moab, Utah, at 2 P. M. July 12, 1941, to consider the offer to purchase the holdings of the Scorup-Somerville Cattle Co. and any other or further buisness that may properly come before the Stockholders.
>
> "Very truly yours,
>
> "Secretary."

In accordance with his custom when giving notices of meetings, the Secretary mailed a copy of the written notice to each stockholder at his address. In response, ten of the eighteen stockholders of the company, representing 220,765 shares out of a total of 253,225 shares outstanding, assembled in a meeting at the home of J. A. Scorup on July 12, 1941. The minutes of that meeting, with certain immaterial omissions, are as follows:

> "July 12, 1941
>
> "The stockholders of the Scorup-Somerville Cattle Company met July 12th, 1941. With the Board of Directors. Present at the meeting were J. A. Scorup, Annie Somerville, Veda Nelson, Harve Williams, James M. Scorup, Edith Scorup, Andrew Somerville, Laura Scorup, and Carroll J. Meador as proxy for Wm. K. Somerville, Edith Scorup proxy for Ellen Scorup, and clerk W. R. McConkie.
>
> * * * * * *
>
> "Mr. Scorup reported that he had offered to sell the outfit for $532,500.00 * * *.
>
> "After some discussion it was moved by Edith Scorup and seconded by James M. Scorup that the presi-

dent be authorized to sell the holdings for $532,500.00 on range delivery or tally the cattle over at $40.00 per head for all born prior to 1941 and a fair price for the 1941 calves; $50.00 per head for 150 horses; $50.00 per acre for farm land, $3.00 per acre for winter grazing land, $5.00 per acre for summer grazing land. Motion carried all voting aye except Veda Nelson who voted no.

* * * * * *

"(Signed) J. A. Scorup President

"(Signed)

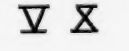
"W. R. McConkie Secretary." (R. 58, 59- 60)

By previous arrangement with Brown, Mr. Scorup met Mr. Wilkins, a partner of Merrion & Wilkins, respondents herein, in Salina, Utah, where they entered into negotiations looking to the sale and purchase of the assets of Scorup-Somerville Cattle Company, petitioner herein. On August 2, 1941 Mr. Scorup on behalf of his company made a proposition to Wilkins which Wilkins said they would take if inspection justified acceptance. (R. 79) Scorup reported to Wilkins that he had authority to enter into the contract he subsequently signed on behalf of his corporation. (R. 29) The so-called "Optional Contract" was prepared, without benefit of legal counsel, and after it had been read and corrected by Scorup and Wilkins, it was executed by the parties in the following form:

"Optional Contract.

"This option made the second day of August, nineteen hundred and forty-one by and between the Scorup and Somerville Cattle Company of Moab, San Juan County, Utah, hereinafter called the Seller and Merrion Wilkins of the city and county of Denver hereinafter called the Buyer.

"Witnesseth: That for and in consideration of the sum of $1,000 in hand paid, receipt of which is hereby acknowledged, Seller does hereby grant to the Buyer an irrevocable option to purchase of approximately 9,000 cattle branded



All calves, horses, mules, other ranch stock, forest permits, Taylor grazing permits, leases, feed now on hand, or growing, trucks, pick-ups, automobiles, farm and ranching machinery, buildings, water rights, ditch rights, and any and all other property personal or real, now owned by the Seller and not specifically mentioned withheld for the total sum of $532,500.00.

"Alternate Option: Seller agrees on the tally branding and delivery of 9,000 cattle at $40 a head and the tally of all 1941 calves at $20 a head. 5,000 of these cattle to be delivered at the railroad. Option to purchase is hereby granted approximately 1,000 acres of irrigated land at $50 an acre 17,000 acres @ $5.00 called the Guyser pasture and 10,000 acres of range land @ $3.00 and 150 head of horses at $50 a piece. Above contract includes permits and rights mentioned in first part of option. The method of purchase is to be selected by the Buyer on or before the first of September. When Buyer accepts option he agrees to make first payment of $74,000 on or before the first of September, which will make the total sum of $75,000. Further payment shall be made either on the basis of the delivery of cattle or the formal turning over of the assets of the Seller. If Buyer fails to go through with purchase price of option payment shall be retained by the Seller as liquidated damages against the Buyer.

"Buyer: Merrion & Wilkins
Russell Wilkins

"Seller: Scorup-Somerville Cattle Company
By J. A. Scorup.

"We have set our hands unto this understanding and agreement the second day of August nineteen hundred and forty-one by and between S. and S. Cattle Company (Seller) and Merrion & Wilkins (Buyer).

"Witnesses:

"James G. Brown.

"Rulon Fairbourn." (R. 84-85)

While the offer to sell was in full force and effect, Wilkins conducted an investigation of the company's property, in the course of which he discussed the deal with several of its stockholders and officers, no one of whom offered a word of disapproval or repudiation of what Mr. Scorup had done in the name of the company. Wilkins, realizing the enormity of the task of getting approximately 9,000 head of cattle off the extensive properties where they ranged, discussed with Mr. Scorup from time to time during the month of August ways and means of delivering the property and of consumating the purchase. However, nothing came of these conversations and no further documents were signed by the parties. (R. 86-89)

On August 27, 1941 respondents accepted the proposition previously made by petitioner and delivered to petitioner the following document:

"August 27, 1941.

"Scorup-Somerville Cattle Company, Moab, Utah.

"Attention: Mr. J. A. Scorup, President.

"Gentlemen: On August 2, 1941, the Scorup-Somerville Cattle Company granted to Merrion and Wilkins, a co-partnership doing business in Denver, Colorado, a certain Option, hereinafter called Option No. 1, dated August 2, 1941 (which option was executed on behalf of said company by its president, J. A. Scorup), to purchase approximately 9,000 cattle and all the real and personal property and other assets of said company for a total purchase price of $532,500.00.

"An alternate option, dated the same date, was also granted by the Scorup-Somerville Cattle Company to Merrion and Wilkins to purchase all of the assets of said company consisting of certain real and personal property and approximately 9000 cattle, 5000 thereof to be delivered to the railroad and the balance to be tally branded, at a total purchase price to be computed on the basis of the number of cattle actually delivered and the number of acres or real property conveyed.

"Said option, according to their terms, each expire September 1, 1941.

> "We, the undersigned, on this 27th day of August, 1941, hereby notify the Scorup-Somerville Cattle Company and its President, J. A. Scorup, that we hereby exercise Option No. 1, hereinbefore described, and we hereby tender to the Scorup-Somerville Cattle Company payment of the purchase price, as provided in said option, upon satisfactory and proper conveyance by the Scorup-Somerville Cattle Company to the undersigned of all of the assets owned by said company on the date of said option and thereafter, including 1000 acres, more or less, of irrigated land, 17,000 acres, more or less, of pasture land, 10,000 acres, more or less, of range land, approximately 9000 cattle, approximately 3000 calves, etc.
>
> "Very truly yours,
>
> "Merrion and Wilkins
>
> By Russell Wilkins (sgd.)" (R. 90)

On August 31, 1941, Wilkins tendered Scorup a draft for $531,500.00, being the total unpaid balance due on the sale, but Scorup refused to accept the draft, because he claimed it was "illegal" and "no good," the 31st of the month being Sunday. (R. 94) Upon parting Sunday afternoon, August 31, 1941, Scorup and Wilkins agreed to meet again the following Tuesday in Moab to talk some more and "go on with the option." (R. 95) Monday, September 1, 1941, was Labor Day, a legal holiday in Utah. On Tuesday, September 2, 1941, Wilkins again called on Scorup pursuant to the appointment they had made and reiterated respondents' election to accept the proposition outlined in "Option No. 1" and tendered $74,000.00 in cash pursuant to the terms of the "Optional Contract." Petitioner refused to accept the tender and Scorup and his attorneys walked away, stating that "the time was up."

Prior to trial Scorup-Somerville Cattle Company (petitioner herein) moved for summary judgment and supported its motion by the pleadings, affidavits and provisions of its articles of incorporation and by depositions taken in anticipation of trial. (R. 15)

Merrion and Wilkins (respondents herein) objected to the motion on the ground that the record presented a case

which did not come fairly within the purview of Rule 56 of the Federal Rules of Civil Procedure. (R. 38-39)

The trial court granted the motion and made and entered summary judgment for Scorup-Somerville Cattle Company. Merrion and Wilkins appealed to the Tenth Circuit Court of Appeals. That court entered its judgment March 8, 1943, saying:

> "It is our conclusion that the issues presented by the pleadings could not be determined on a motion for summary judgment, and that the court erred in entering such judgment."

Italics used in quoted portions of brief have been supplied by us.

BASIS OF JURISDICTION

Petitioner urges that the Tenth Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, and that the decision of the Circuit Court of Appeals creates doubt and confusion with reference to the laws of corporations in the State of Utah.

It is suggested by respondents that a matter of corporate procedure in the State of Utah presents no question of such public importance as will justify the assumption of jurisdiction by the Supreme Court of the United States. This is especially true when, as here, the opinion of the Circuit Court of Appeals is not in conflict with any decisions of the State of Utah, but on the contrary is supported by them. Had the Supreme Court of Utah written the decision complained of by petitioner, it would not have reversed any of its previous opinions.

Petitioner also represents that the opinion of the Tenth Circuit Court of Appeals is "uncertain in its implications," and that said court ignored certain law points presented by petitioner at the argument. Petitioner's objection goes to what it asserts is the uncertainty of an offer and its acceptance. The Tenth Circuit Court of Appeals considered the evidence and the arguments of petitioner which it reiterates here, and then decided there was a continuing offer and an unconditional acceptance thereof. The Supreme Court of the United States will not grant certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures*

Corporation v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273. If petitioner had fault to find with the opinion on this score, it should have filed a motion with the Circuit Court of Appeals for a rehearing rather than seek such relief in this court under the guise of petition for certiorari.

ARGUMENT

Points Relied On By Respondents

1. There is nothing in petitioner's brief or in the record to show that the decision of the Tenth Circuit Court of Appeals either conflicts with or introduces confusion into the corporation laws of the State of Utah. The ruling of the Circuit Court of Appeals that the meeting of the stockholders of the corporation authorizing the sale of petitioner's assets was properly noticed and held, is not in conflict with any statute of the State of Utah or any decision of the Supreme Court of the State of Utah. Further, the ruling that the stockholders, as owners of the company (petitioner herein), had the power to authorize the President of the company to sell its assets is not in conflict with any statute of the State of Utah or any decision of the Supreme Court of the State of Utah.

a. Mailing of written notice to each stockholder of the special meeting of stockholders held July 12, 1941 constituted personal service of notice under the laws of Utah.

Tooele Meat and Storage Company v. Morse, 43 Utah 515, 136 P. 965;

Greenwood v. Bramel, 54 Utah 1, 174 P. 637.

b. The stockholders of a corporation have the right to authorize the sale of all the property of their corporation.

Hearst v. Putnam Mining Co., 28 Utah 184, 77 P. 753;

Cooper v. Light & Power Co., 35 Utah 570, 102 P. 202.

2. An innocent person when dealing with a corporation is not required to ascertain at his peril whether or not a directors' meeting was properly called and legally convened and whether or not a quorum was actually present at the meeting. The corporation is bound by its contract with a party who

deals with it in good faith, although there may be a defect in the authority of those acting for the corporation.

Huntington Roller Mills & Mfg. Co. v. Miller, 60 Utah 236, 208 P. 531;

Merchants National Bank of Boston v. The State National Bank of Boston, 77 U. S. 676, 19 L. Ed. 1008.

3. The "Optional Contract" and the offer therein contained are certain, but if there be ambiguity, evidence will be received to clarify it.

Chournos v. Evona Investment Co., 97 Utah 335, 93 P. (2d) 450;

Easton v. Thatcher, 7 Utah 99, 25 P. 728;

Cummings v. Nielson, 42 Utah 157, 129 P. 619.

4. The "Optional Contract" and the offer therein contained were exercised and accepted unconditionally by respondents, who tendered payment to petitioner in accordance with the terms of the "Optional Contract" and offer.

Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28;

Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887;
Horgan v. Russell,

24 North Dakota 490, 140 N. W. 99;

McCormick v. Stephany, 61 N. J. Eq. 208, 48 Atl. 25;

Cates v. McNeil, 169 Cal. 697, 147 P. 944;

Restatement of The Law of Contracts, Par. 38, Illustrations and Comment on Page 46.

POINT 1, a.

The articles of incorporation of petitioner provide that special stockholders' meetings "shall be called and notice thereof shall be given in the manner provided by law." (R. 35) The law of Utah covering special stockholders' meeting is

found in *1933 Revised Statutes of Utah, 18-2-41,* which provides as follows:

> "* * * When not otherwise specified in the articles of incorporation or by-laws special meetings of the stockholders may be called by the president, by any three directors, or by any number of stockholders owning not less than one-third of the outstanding stock entitled to vote at such meeting, and notice thereof shall be given by personal service of the notice upon each such stockholder at least five days before the day fixed for the meeting or by advertisement * * *."

The stockholders' meeting of July 12, 1941 was called as usual, pursuant to order of J. A. Scorup, President of the company and the owner of more than one-third of the outstanding stock of the company entitled to vote at such meeting. (R. 52) The notice was in writing and named the time, place and purpose of the meeting. (R. 62) It was served in the customary manner by depositing it in the United States mails at Moab, Utah, some time prior to July 5, 1941, the date of the Ellen Scorup proxy, addressed to the respective stockholders of the company. (R. 61-62)

Under the Utah cases this was personal service. The policy of the Utah law is defined in the case of *Tooele Meat and Storage Co. v. Morse,* supra, where the Supreme Court of Utah in discussing service by mail under a Utah statute requiring personal service, said that if the notice required by the statute emanates from an authentic source and is such as to apprise the party to be notified fully of the whole substance of the matters concerning which the statute requires notice to be given, the notice is ordinarily held to be sufficient.

In *Greenwood v. Bramel,* supra, notice of judgment and notice of appeal were served by mail. The appeal was resisted on the ground that the notice was defective under the statute. The Supreme Court of Utah held that the notice was good. The statute under consideration provided:

> "* * * Notice of the entry of judgment must be given to the losing party by the successful party either *personally* or by publication, and the time of appeal shall date from the service of said notice. * * *"

Under this statute personal service in the alternative is required just the same as it is required under *1933 R. S. U. 18-2-41,* supra. In its opinion the court said:

> "The second notice in legal form was served by depositing it in the United States Post Office at Salt Lake City duly addressed to Warenski's counsel at Murray, on January 28, 1918. *We think this was personal service of the notice on Warenski,* as contemplated by Comp. Laws 1907, section 3331."

The purpose and requirements of the two statutes are the same and the interpretation of the Supreme Court of Utah of the one is persuasive, and perhaps binding, as to the other. Service by mailing is personal to the addressee and is an efficient and reliable method of apprising the addressee of the contents of the notice. That one statute pertains to notice of appeal and the other to stockholders' meetings makes no difference in principle.

POINT 1, b.

In Utah the stockholders of a corporation have the right and power to authorize the sale of all the property of their corporation. *Cooper v. Light and Power Co.,* supra. At page 581 of the Utah report, the court says:

> "As a general rule, a corporation having no public duties to perform has ordinarily the same power to sell, with the *consent* of its stockholders, all its property, including its privileges and franchises, except its franchise to be a corporation, that an individual has. * * *"

The word, *"consent"* as used by the court means that the stockholders may act before the corporation, acting through its officers, sells all its property. They need not await the sale and then merely confirm.

In *Hearst v. Putnam Mining Co.,* supra, the Utah court says at page 197 of the Utah report that a corporation

> "* * * may, in the absence of restraint by the law of its creation, lease, sell, or dispose of any or all of its property, the same as an individual may do

> respecting his property. This may be done by a majority of the members. The principle that the majority must rule in the management of the affairs of a corporation 'is rigidly upheld in equity, in the absence of fraud, oppression, and ultra vires acts.' "

It is true that the broad of directors, in the exercise of the corporate powers, may sell the corporate property; but if they do, the sale, in order to be binding and valid, must be confirmed by a vote of the majority of the stockholders. *Revised Statutes of Utah, 1933, 18-2-16 (7)* provides:

> "* * * When the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors in selling or otherwise disposing of such property shall not be valid or binding on the corporation until confirmed by a vote of a majority of the stock entitled to vote at a meeting of the stockholders duly called to consider such action of the board. * * *"

This statute is not in conflict with the cases cited. It in no wise restricts the right of stockholders to authorize the sale of all the corporate property. On the contrary, it recognizes that the ultimate right of disposition resides in them and not in the board of directors. The statute is a limitation on the power of directors, not on the power of the stockholders.

POINT 2.

The minutes of the meeting held July 12, 1941 reveal on their face that the stockholders met with the board of directors. There is no irregularity whatever to be found or suggested in the official minutes of the company. The alleged irregularities in the service of notice and in the authority of the President and in the transactions had between petitioner and respondents were all discovered long after the time petitioner says they occurred and were brought to light by defense counsel in an attempt to give legal sanction to the repudiation by the petitioner of the acts of its President. Respondents were not required to ascertain at their peril whether or not a directors' meeting was properly called and legally convened and a quorum of the board was actually present at the meeting. Assuming, but not admitting, that

the President's authority to sell had to originate with the board of directors as contended by petitioner, respondents, had they scrutinized the minutes of the meeting of July 12, 1941 would have seen that the directors met with the stockholders, and that Scorup had been authorized to sell the properties of the company. The corporation cannot escape the consequences of its commitments by the simple expedient of repudiating its own minutes, even though there may have been a defect in the authority of those acting for it.

In *Huntington Roller Mills &Mfg. Co. v. Miller*, supra, where the corporation mortgaged all of its property, the Utah Supreme Court said:

> "One of the principal errors assigned and argued is that the court erred in its finding that said note and mortgage were duly executed and delivered at the meeting held by the board of directors of appellant, consisting of the three members named in the findings. Counsel for appellant, with much vigor, contend that the preponderance of the evidence is to the effect that the directors' meeting at which the note and mortgage were authorized was a special or called meeting; that no notice was given to the two directors who were not present at said meeting, and for that reason the meeting held by the three directors was not authorized by law, and hence their act in authorizing the execution and delivery of the note and mortgage in question was invalid and of no force or effect. (Cases cited.) The foregoing authorities hold that, generally speaking, special or called meetings of a board of directors cannot legally be convened and held without notice to the directors, and that the acts of a quorum of the directors when acting without notice of the meeting with certain exceptions are invalid and cannot be enforced. The question, therefore, is: Are all persons dealing with corporations required to ascertain at their peril whether a directors' meeting was properly called and legally convened, and whether a quorum was actually present at said meeting?
>
> "That question has frequently come before the courts. In 3 Cook, Corps., in the section before referred

to, the author, in speaking of the question now under consideration says:

"'Difficulty has arisen in determining whether a person taking a mortgage from or executing a contract with a corporation is bound to ascertain whether a quorum of the directors was present at the directors' meeting which authorized the instrument, and whether a majority voted in favor thereof. There are many cases where the mortgages and contracts have been held void by reason of defects in the calling, holding, or voting at the directors' meeting.

"'The rule sustained by the great weight of authority, however, is that, where a corporate mortgage or contract is signed and sealed by the corporation and delivered to the proper person, who takes it in good faith, he may act upon it, and is protected even though the directors' meeting was not regularly called or held. A quorum of the directors is presumed to have been present. A quorum is not present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted.'

"Moreover, in the case at bar it appears from the bill of exceptions that the minutes of the directors' meeting at which the note and mortgage in question were authorized affirmatively show that the meeting was duly held, and that a quorum was present and voted in the affirmative. If the respondent, therefore, had examined the records kept by the corporation, all that she would have discovered would have been that the note and mortgage were duly authorized by the corporation through its directors."

Merchants' National Bank of Boston v. The State National Bank of Boston, 77 U. S. 676, 19 L. Ed. 1008. At page 1018 the court says:

"Where a party deals with a corporation in good faith —the transaction is not ultra vires—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corpo-

ration, and there is nothing to excite suspicion of such defect or irregularity; the corporation is bound by the contract, although such defect or irregularity in fact exists.

"If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

"The jury should have been instructed to apply this rule to the evidence before them.

"The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court."

On the record, a jury could find the President of petitioner was authorized to execute the "Optional Contract", which, it will be noted, was never requdiated by petitioner. *Carlquist v. Quayle,* 62 Utah 266, 218 Pac. 729.

POINTS 3 AND 4.

It is suggested that petitioner should not request the Supreme Court of the United States to review an opinion of the Circuit Court of Appeals because of alleged uncertainty. The certainty or uncertainty of an offer and the acceptance thereof depend in large measure on oral testimony and inferences to be drawn therefrom. The United States Supreme Court ordinarily will not grant certiorari to review such matters. *General Talking Pictures Corp. v. Western Electric Co.*, supra. Inasmuch as petitioner devotes considerable space to this aspect of the case, respondents present their views in this connection. Respondents submit there is no uncertainty in the offer and its acceptance. The minutes of the meeting of July 12, 1941 show the President had already offered to sell the outfit for $532,500.00. A motion then follows authorizing the President to sell the holdings of the company for $532,500.00 on "range delivery or tally the cattle over at $40 per head for all born prior to 1941 and a fair price for the 1941 calves; $50 per head for 150 horses, $50 per acre for farm land, $3 per acre for winter grazing land, $5 per acre for summer grazing land * * *." (R. 58)

In the "Optional Contract" petitioner's President, responsive to the authorization, offered to sell its property to respondents for $532,500.00. In the same document and pursuant to the authorization the holdings were offered on the basis of tally branding and delivery at a price per unit.

The "Optional Contract" contains two methods of purchase and "the method of purchase was to be selected by the buyer on or before the first of September." The instrument then provides that when the buyer accepts he is to make the first payment of $74,000.00 on or before the first of September, which, when added to the $1000 paid for the option August 2, 1941, would make the total sum of $75,000.00. The offer could be accepted at any time before September 1, but the payment of $74,000 did not have to be made before that date. Further payment, that is, the balance of the purchase price is to be made on the basis of *delivery* of cattle *or* the *formal turning over* of the *assets* of the seller. If the buyer accepted the offer to sell on the tally or unit basis the further payment was to be on the basis of delivery; whereas, if the buyer accepted the offer to sell all the property for $532,500.00 the further payment was to be on the basis of the formal turning over of the assets of the seller. (R. 84-85) This was a continuing offer, *Chournos v. Evona Investment Company,* supra, which was never withdrawn by the offeror. After respondents filed suit against petitioner for breach of contract, it was claimed for the first time by petitioner that the offer to sell was rejected by what it designates a counter-offer on the part of respondents, but which the Circuit Court of Appeals held was an unconditional acceptance of the offer. The acceptance referred to was delivered to petitioner on August 27, 1941 and provided:

"August 27, 1941.

"Scorup-Somerville Cattle Company, Moab, Utah.

"Attention: Mr. J. A. Scorup, President.

"Gentlemen: On August 2, 1941, the Scorup-Somerville Cattle Company granted to Merrion and Wilkins, a co-partnership doing business in Denver, Colorado, a certain Option, hereinafter called Option No. 1, dated August 2, 1941 (which option was executed on behalf of said company by its president, J. A. Scorup), to purchase approximately 9,000 cattle and all the real and personal

property and other assets of said company for a total purchase price of $532,500.00.

"An alternate option, dated the same date, was also granted by the Scorup-Somerville Cattle Company to Merrion and Wilkins to purchase all of the assets of said company consisting of certain real and personal property and approximately 9000 cattle, 5000 thereof to be delivered to the railroad and the balance to be tally branded, at a total purchase price to be computed on the basis of the number of cattle actually delivered and the number of acres or real property conveyed.

"Said option, according to their terms, each expire September 1, 1941.

"We, the undersigned, on this 27th day of August, 1941, hereby notify the Scorup-Somerville Cattle Company and its President, J. A. Scorup, that we hereby exercise Option No. 1 hereinbefore described, and we hereby tender to the Scorup-Somerville Cattle Company payment of the purchase price, as provided in said option, upon satisfactory and proper conveyance by the Scorup-Somerville Cattle Company to the undersigned of all of the assets owned by said company on the date of said option and thereafter, including 1000 acres, more or less, of irrigated land, 17,000 acres, more or less, of pasture land, 10,000 acres, more or less, of range land, approximately 9000 cattle, approximately 3000 calves, etc.

"Very truly yours,

"Merrion and Wilkins

By Russel Wilkins (sgd.)" (R. 90-91)

The offer known as "Option No. 1" was accepted; payment of the purchase price was tendered as provided in the "Optional Contract." That is, payment was to be made in accordance with the terms of the offer upon satisfactory and proper conveyance by the seller of the assets purchased. That the buyer, after an unequivocal acceptance of the seller's offer, indicated the nature and amount of property to be turned over, and that the conveyance of the property should be proper, indicates only that which in law and under the offer the seller

was bound to do and does not vitiate or tend to vitiate the acceptance, *Turner v. McCormick, Kreutzer v. Lynch, Horgan v. Russell, McCormick v. Stephany, Cates v. McNeil, Restatement of The Law of Contracts,* supra.

At all times the parties knew the meaning of the offer and its acceptance. They were never uncertain to them. The parties conducted their business with the assurance that an offer had been made and accepted. But if there be any uncertainty, it is the type of uncertainty which under the law can be made certain by evidence at a trial of the issues. The universal rule that, that is certain which can be made certain, was early adopted and has been constantly adhered to by the courts of Utah. *Easton v. Thatcher,* supra; *Cummings v. Nielson,* supra.

Upon the record it appears that respondents made tender to petitioner of the $74,000.00 in cash a few minutes before six o'clock P. M. on September 2, 1941, and at the same time reiterated their acceptance. This was within the time fixed by the agreement for such payment, since September 1, 1941 was a legal holiday in Utah. *R. S. U. 1933, 37-0-1; 88-2-8; Leiner v. State Mutual Life Assurance Co.,* 108 F. (2d) 302. Petitioner refused to accept the money and rejected the tender, not because of any of the reasons now urged to defeat its agreement, but, as stated by Mr. Scorup, petitioner's President, because "the time was up." (R. 96-97) The trier of facts would be justified in finding that this statement of Mr. Scorup and petitioner's attorneys was the only basis for the repudiation of their contract. This excuse, however, was not repeated in the District Court and nothing was claimed for it in the Circuit Court of Appeals. When the tender was made it was then too late for petitioner, under any view of the case, to withdraw its offer or repudiate its contract.

On the record before it and after hearing the same arguments of petitioner it is now advancing to this court, the Tenth Circuit Court of Appeals held that petitioner made a continuing offer which respondents accepted unconditionally, thus giving rise to a contract between the parties, which petitioner had no right to repudiate.

CONCLUSION

It is the conclusion of respondents that:

1. The Tenth Circuit Court of Appeals properly held the trial court erred in entering summary judgment for peti-

tioner and against respondents, because the Scorup-Somerville Cattle Company, petitioner herein, by and through its President, duly and legally authorized thereto, entered into what was termed an "Optional Contract" with respondents whereby petitioner offered to sell all its assets to respondents for $532,500.00, which offer respondents accepted, thus giving rise to a contract, performance of which was tendered by respondents to petitioner and by petitioner rejected.

2. The Supreme Court of the United States should deny the petition for certiorari in this case.

Respectfully submitted,

ROBERT L. JUDD,
PAUL H. RAY,
S. J. QUINNEY,

Attorneys for Respondents.

A. H. NEBEKER,
Of Counsel.